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IN THE

Supreme Court of the United States

October Term, 1969.

No. **1585**

RUDOLPH IZZI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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RUDOLPH IZZI,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner, Rudolph Izzi, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals entered in this case on April 20, 1970 (Appendix C hereto, *infra*, p. A-11).

Citations to Opinions Below.

The yet unreported opinion of the Court of Appeals, affirming the judgment of conviction herein, is printed in Appendix A, hereto, *infra*, pp. A-1-8.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 20, 1970 (Appendix C, hereto, *infra*, p. A-11). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented for Review.

1. On the eve of his trial by jury, the petitioner was, by a surprise prosecution motion, ordered by the trial court to furnish the Government with handwriting exemplars for comparison with an incriminating questioned signature.

a) Were the petitioner's rights under the self-incrimination and due process provisions of the Fifth Amendment violated when the Government, rather than simply using the exemplars for comparison with the questioned signature, attempted to prove that the petitioner had altered his handwriting in giving the exemplars? Did the trial court concretize the resulting prejudice when it charged the jury that it could take into account the circumstances under which the exemplars were given? Did this not effectively portray to the jury a consciousness of guilt on the part of the petitioner? Was this not an attempt to impeach the petitioner although he did not testify at the trial?

b) As a condition precedent to prosecutorial comment upon the petitioner's allegedly distorted execution of the exemplars (if such comment was allowable at all) should the prosecution have given the petitioner an opportunity to execute new exemplars?

c) Assuming that the propriety of such comment is a necessary consequence of a right to compel handwriting exemplars, should this Court reconsider its prior holdings that such compulsion does not violate the privilege against self incrimination?

d) Where there was no prior notice of a handwriting issue in the case, did the Government's eve-of-trial motion, admittedly necessitated by its own oversight, require the granting of a continuance to the defense so that a

handwriting defense could be properly prepared? Did the refusal of the trial court to grant a continuance so handicap the defense as to be violative of due process and of the spirit of the Federal Rules of Criminal Procedure?

2. The petitioner was charged with the knowing transportation of stolen stock certificates in interstate commerce. Did the Government, as a matter of law, fail to prove each of the essential elements of the crime, to wit:

a) That the stock certificates were stolen;

b) That the petitioner transported the certificates in interstate commerce;

c) That the petitioner knew that the certificates had been stolen?

Was the sum total of successive inferences required for conviction so dependent upon conjecture that a reasonable doubt was present as a matter of law?

Constitutional Provisions and Statutes Involved.

This case involves the due process and self-incrimination provisions of the Fifth Amendment, and Title 18 U. S. C. §2314 (transportation of stolen goods in interstate commerce). These provisions are quoted in Appendix F hereto, *infra*, p. A-13.

Statement of the Case.

Proceedings.

A. The Indictment.

Criminal proceedings were commenced by the filing of a one count indictment in the United States District Court for the Southern District of New York on April 3, 1967. The indictment named only the petitioner and charged

him with the transportation of stolen stock certificates, valued at more than $5,000, from New York City to Gettysburg, Pennsylvania, knowing them to have been stolen, in violation of 18 U. S. C. §2314.

B. Pre-trial Proceedings.

The defendant was arraigned upon the indictment on May 3, 1968, and entered a plea of not guilty. On May 28, 1968, he moved for dismissal of the indictment, a bill of particulars, and discovery and inspection. The motion for dismissal was denied. Particulars were granted only to the extent that the defense was advised that the Government would claim that the transportation commenced in Manhattan and was by automobile. Physical inspection of the certificates was also granted. No other information, other than the bare charge of the indictment, was given to the defense prior to trial.

On March 27, 1969, a pre-trial conference was held, and trial was set to commence on April 7, 1969.

On April 1, 1969, defense counsel was served with an order, signed by the trial judge, returnable April 3, 1969, calling upon the defendant to show cause why he should not give samples of his handwriting in a form requested by the Government. On the return date, the Court overruled constitutional and procedural objections to the Government's application, and the defendant was ordered to give handwriting exemplars. The exemplars were taken that afternoon, and the procedure was recorded by a court reporter.

C. Trial, Verdict and Sentence.

The trial was commenced on April 7, 1969, and terminated with a jury verdict of guilty on April 11, 1969. Judgment was entered on May 14, 1969, and the Court im-

posed a sentence of eight (8) years imprisonment upon the defendant.

D. Appeal.

An appeal from the judgment of conviction was taken to the United States Court of Appeals for the Second Circuit, and that Court issued its affirmance on April 20, 1970. The points raised in the Court of Appeals are reproduced in Appendix D hereto, *infra*, page A-12.

The Government's Case.

A. Outline.

The Government attempted to prove that, at an unspecified time during the summer of 1966, 50 certificates of IBM stock, each representing 100 shares, were illegally taken from the lower Manhattan offices of the stock brokerage firm of Hayden, Stone and Company [hereinafter, the "Brokerage Firm"], and that, on January 25, 1967, the defendant drove from Manhattan to Gettysburg, Pennsylvania with 26 of those certificates in his possession. His alleged destination was the Gettysburg Motor Lodge [hereinafter, the "Motel"], where representatives of the Bankers and Telephone Employees Insurance Company [hereinafter, the "Insurance Company"] were waiting for a messenger to deliver the certificates.

At the time, the Insurance Company was in financial difficulty, and the Pennsylvania State Insurance Commissioner had directed that unless a certain program of rehabilitation were followed, the company would be dissolved. One of the specifications was that, by no later than January 25, 1969 (the date of the transportation), the Insurance Company would have to produce 2,600 shares of negotiable IBM stock at the office of the Commissioner in Harrisburg, Pennsylvania. The defendant's alleged

mission was solely as a messenger, and it was to get those 2,600 shares to the Insurance Company representatives at Gettysburg, so that the representatives could take them to Harrisburg before the deadline.

The Government claimed that the defendant arrived at the motel in a red Cadillac automobile in the company of a blonde female, signed the guest register under the fictitious name, "R. Randolph", and then went across the motel grounds to a room occupied by John Marken, an officer of the Insurance Company. He allegedly gave Marken an envelope containing the 26 certificates, they had a discussion, and then Marken left for Harrisburg, where the certificates were approved by other officers of the Insurance Company and by the Pennsylvania Commissioner of Insurance. Marken returned to the Gettysburg Motel, had another discussion with the messenger, and then the messenger departed.* A month later, the FBI seized the certificates from the Insurance Company.

At trial and in the Court of Appeals, the defense raised and preserved, *inter alia*, each of the points advanced by this petition.

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*Four Government witnesses claimed to have seen the messenger during his stay at the motel. Marken and Marken's female companion, both of whom had comparatively extensive exposure to the messenger, testified that the messenger was not in the courtroom, although the defendant was specifically pointed out to them. A motel employee, who saw the messenger only briefly at the time of registration, and who was not called upon to make an identification of the defendant until eighteen months later (and then only by photograph), testified that the defendant was the person who had registered as R. Randolph. An insurance company employee who, from a distance of twenty or thirty feet, saw the messenger cross the motel grounds to Marken's room, first testified that the defendant "appears to be" the man, and then testified, "Let me put it this way: The man looks familiar to me, and I don't know of any other time when I would have come in contact with him."

B. The Handwriting Exemplars.

1. The Eve-Of-Trial Government Motion For The Exemplars: Government Neglect Becomes The Defendant's Burden.

The defendant was arraigned on May 3, 1968. His pretrial motions were argued and decided by May 28, 1968. The Government made no cross-motion for reciprocal discovery as permitted by Rule 16(c) of the Federal Rules of Criminal Procedure. In November, 1968, the Government, by the same Assistant United States Attorney who was in charge of all subsequent proceedings, noticed the case for a trial part. On March 27, *1969*, a pretrial conference was held by the trial judge, "* * * to set a trial date and to find out whether there are any discovery matters or the like that are open." Nothing was said by the prosecutor concerning "discovery matters or the like", and trial was set to commence on April 7, 1969.

Five days later, on April 1, 1969, at 3:30 P.M., defense counsel was served with an order, signed by the trial judge, requiring the defendant to show cause why he should not appear and give handwriting samples to the United States Attorney. This was the first notice given by the Government to the defense concerning the existence of a handwriting issue in the case, and it gave no indication concerning the nature of the questioned writing or the form which the exemplars were to take.

Upon the return date of the order, the defense, by affidavit and oral argument, opposed the Government's application, urging the protection of the Fifth Amendment, as well as procedural objections.

When the Court inquired as to why the Government had waited until "the eve of trial" to make its application, the prosecutor merely responded that he was not aware that

the exemplars had not previously been obtained (although he had been in charge of the case for at least five months prior to this hearing).

The Court overruled the defense objections, and ordered that the defendant submit to handwriting identification tests that afternoon. Defense counsel then moved that he be furnished with a copy of the report that the Government expert might render, and requested a continuance so that he could retain a defense expert and adequately prepare a handwriting defense. The Court ruled that:

> "* * * the Government will be required to turn over to you any report made by its expert and to do so promptly upon the receipt of the same by the United States Attorney."

Unknown to the Court and the defense, and not revealed until the first day of trial which was four days after this hearing, the prosecution already had in its possession an FBI handwriting report which compared known signatures of the defendant with the questioned signature. That report was unable to establish an identifying connection between the questioned and known signatures.

The motion for a continuance was denied by the Court with the rationale that "There is no rule to my knowledge that says you are entitled to a continuance when the Government the week before trial asks for a sample."

Thus, with one weekday intervening before the commencement of trial, defense counsel found himself in the position of having to find a handwriting expert who would be willing to testify for a defendant in a serious criminal case under rush conditions.

Following the above hearing, the defendant gave the Government such handwriting samples as it desired, and a stenographic record of the procedure was made by a Court reporter. The samples were taken on prepared

cards, and included the letters of the alphabet, numbers, the Defendant's signature, and what, at trial, was revealed to be the questioned signature: "R. Randolph." The defendant gave the Government every specimen requested, with the prosecutor and two special agents looking on, and no complaint was made that the Defendant had not complied with their every request.

2. The Ordeal Of The Defense Expert

On the morning of the first day of trial, before any other proceeding commenced, defense counsel moved for a continuance since he had not yet been able to obtain the services of a handwriting expert and had not yet been given the documents with which the expert would have to work. The Court retorted that there had been enough time to find a handwriting expert (one weekday), and that the only document the expert would need would be a sample of the defendant's signature, which the defendant could give to his own counsel at any time. This analysis was simplistic to say the least. The defendant's signature had to be compared to something! Since the handwriting materials first had to go to the FBI in Washington, the defense expert had to await their return before he could commence his work. As it turned out, although the exemplars were taken on April 3, 1969, the FBI did not commence work on them, in Washington, until April 7, 1969—the first day of trial. The defense was not given access to them until the evening of April 9, 1969, and the defense expert had to testify on the following day.

On the third day of trial, the Government's handwriting report was given to the defense. Defense counsel noted to the Court that he had not yet been able to obtain the services of a handwriting expert, but he had an appointment with one on that day. He was denied permission to

take the relevant handwriting exhibits to the expert's office so that they might be examined and photographed.

That evening, the defense expert was made to examine and photograph the documents at a table in the corridor of the Federal Courthouse. When the documents upon which the Government expert's report was based were requested, the defense expert was given: the questioned document; checks, income tax forms, and fingerprint cards signed by the defendant; and the exemplars which had been executed by order of the Court.

After photographing the items in question, the defense expert had to return to his office that night, develop the film, enlarge it, print it, come to a conclusion and create illustrative exhibits. In addition, he was, presumably, expected to prepare the defense attorney for the task of cross-examining the prosecution expert as well as examining the defense expert. At the same time, defense counsel, perforce, had to attend to the other matters of importance in the trial.

The following day, which was the fourth and final day of testimony, saw the experts for both sides testify. The Government also introduced into evidence approximately half of the documents which had been exhibited, *without caveat*, to the defense expert on the night before. When, later that day, the defense expert, Osborn, testified, it was discovered that he had relied completely upon the documents which the Government had displayed to him the night before. Since only about half of those which he used in his illustrative exhibits were in evidence, the Court sustained a Government objection to the exhibits, and required that those parts not in evidence be removed from the charts. This rendered the charts practically useless for illustrative purposes. This Court is, no doubt, familiar with the methodology of such charts, which requires that various letters and writing characteristics be

placed with specific proximity to each other so that the point sought to be made can be demonstrated. The gaps caused by the removals frustrated that purpose.

A defense motion for a continuance, so that new charts could be created, was denied. The whole process must surely have caused the jury to believe that the defense was attempting to perpetrate a fraud.

3. The Government's Use Of The Exemplars At Trial: A Metamorphosis From Identification To Self-Incrimination.

Webb, an FBI Special Agent and a questioned document examiner, testified as a witness in behalf of the Government. His task was to establish that one signature, "R. Randolph," signed on the registration card at the motel, was written by the defendant. The handwriting exemplars, taken pursuant to the order of the Court, had been introduced as Government Exhibits 28 through 38, inclusive. He created a number of charts which were enlargements of the exemplars, the questioned signature, and selected other known writings of the defendant.

Based upon the various exhibits, Webb concluded that the defendant had been the same person who signed the motel registration card.

Both, when the originals of the handwriting exemplars were admitted into evidence, and when the enlargements of those exemplars were admitted into evidence, it was pointed out to the jury by the Court and by the prosecutor that they had been taken just a few days before in the Courtroom.

During the direct examination of the Government's expert, the expert challenged the defendant's handwriting on the Court-ordered exemplars:

"* * * A significant thing here [referring to Exhibit 41, a fingerprint card signature of the defendant], I think—I consider it as such—is that there is a break in the line of writing here which is characteristic of this individual at this point here (indicating), and that is the pen or pencil is lifted before starting the next letter in the signature here as well as in this name which was written on this registration card [the questioned document].

"However, in the writing on Exhibit 43 [the Court-ordered exemplars], in which I found evidence that these were written much slower, and because of the reduced speed this break does not occur. However, that is true in all these in exhibits 43 here, and then this one is exhibit 44 [also Court-ordered exemplars]. There is not this pen lift. In all the other signatures, however, on these exhibits I found that there was this lift of the pen or pencil.

"The Court: You are referring now to the—

"The Witness: Exhibit 41 and also to Exhibit 42.

"The Court: Yes. Those are the cards that were signed according to the testimony of the Deputy Marshal in one case and the FBI agent back in 1968. The other cards you are referring to that have what you call a slower writing were written on April 3, 1969, which was last week.

"The Witness: Yes, sir" [R. 475-476].

There thus commenced what was to be a steady attack upon the credibility to be afforded the signatures given by the defendant in obedience to the Court order.

In his cross examination of the defense expert, the prosecutor challenged, at length, whether the requested exemplars were written in a "normal," "natural," "fluent" manner and sought to establish that they were written "in an unusual manner." [R. 605-617, and preceding preparatory questioning.] He repeated his point over and over again in an attempt to drive it home to the jury.

He followed through on this course of action in his summation. Addressing himself to the testimony of the defense handwriting expert, he told the jury:

> "Don't you think you could find that Mr. Osborn's testimony was mostly gobbledygook and to the extent that it wasn't gobbledygook it was just plain wrong? Because, observe: The last two questions I asked Mr. Osborn were these: I showed him the three so-called regular course of business fluent samples of Mr. Izzi's handwriting and I showed him the so-called requested writing and I asked him, didn't he think there was a bit of a difference between this three and a half incher and these one and a half inchers, this one that goes out of the box and he finishes over here and these which all fit in the box (indicating)?
>
> "And he said—well, he gave a long speech that when a guy is asked to give a sample you might think he's attempting to disguise. He said it, not me. But you expect variations if a guy is a little self-conscious and all that.
>
> "I asked him whether the differences were slight or major.
>
> "'Well, you know, slight.'
>
> "There isn't any doubt in his mind, says he, that the same man who wrote this also wrote these three. Well, of course there isn't because the government witnesses—I mean, it is established the same man who wrote this wrote these three and he doesn't see much difference between this one and these three.
>
> * * *
>
> "Well, really his last two answers constituted terrific cross examination and not by me because he did it all himself, because I couldn't get him to answer my questions" [R. 723-724].*

*Osborn, the defense expert, had testified that the questioned signature, "R. Randolph" did not afford a sufficient basis for the conclusion that it was written by the same person who had written the exemplars and other known writings of the defendant. The task of a questioned document examiner is to determine whether there are sufficient points of similarity to reach such a conclusion. He found the minimum number of points lacking.

In his charge to the jury, the Court reinforced the prosecutor's arguments:

> "(Y)ou may take into consideration the circumstances surrounding the handwriting specimens used as the basis for their comparison, including the fact that certain specimens were furnished last week when this trial against the Defendant was imminent" [R. 758].

C. The Government Attempt to Prove That the Stock Certificates Were Stolen.

One of the essential elements of the crime was proof that the stock certificates were illegally taken (theft, conversion or fraud) from the offices of the Brokerage Firm. In order to establish this, the prosecution relied solely upon the testimony of two persons: the cashier of the firm and a former partner of the firm.

They testified that in July or August of 1966, there appeared to be a shortage of 5,000 shares of the Brokerage Firm's holdings of IBM common stock. Contradicting each other, one stated that a stock exchange audit had uncovered the problem; the other testified that the matter came to light in connection with the payment of an IBM dividend.

A thorough search was conducted, and the missing shares could not be located. While these two witnesses were technically responsible for the safekeeping of the firm's securities, they were not the persons who physically conducted the search. No one who ever handled or saw or logged the missing certificates testified.

Neither of the two witnesses had any explanation for the inability to locate the missing shares. They relied upon the analysis of many other persons for the conclusion that the records did not reveal the certificates in

this prosecution to have been sold, exchanged or pledged as part of the innumerable transactions entered into by the firm.

Part of the problem involved in the search for the missing shares was that they were part of a fungible group, that is, the Brokerage Firm had a large number of IBM certificates registered in its own name, and these certificates (all fully negotiable and endorsed in blank) were used at random to satisfy demands upon the firm's holdings of that particular stock. Neither of the witnesses could even approximate the total number of IBM shares or certificates which made up the firm's holdings. No evidence concerning the number of shares which should have been on hand, or the number of shares which were actually on hand, was ever placed before the jury. The fact of a discrepancy was revealed to the jury simply as the conclusion of these witnesses, without any of the facts upon which that conclusion was predicated.

They testified that, initially, only the fact of a shortage was suspected. It was yet to be determined which particular certificates were missing. This involved an analysis of the numerous transactions entered into by the Brokerage Firm involving IBM stock. The analysis, conducted by persons who did not testify, produced three documents. The first two were received in evidence and revealed that on or about January 6, 1966, 5,000 shares of IBM stock were delivered to a certain bank by a messenger of the firm as part of the security for a large scale loan. Since these two documents did not note the registration numbers of the certificates involved, there was no reason to believe that those certificates were in any way connected to the 5,000 missing shares (or to the 2,600 shares which later formed the subject matter of this prosecution).

However, a third document is alleged to have been found which was a list of the actual registration numbers of the certificates which had gone to the bank. The document was not produced at the trial because the Brokerage Firm appeared to have lost it. The former partner of the firm testified that, before it was lost, he copied the certificate numbers from it into a letter which he sent to the Stock Clearing Corporation as part of a report concerning apparently missing securities. This letter was marked in evidence as Government Exhibit 4, over objection, in the absence of the original list. Twenty-six of the certificates listed therein had the same numbers as the twenty-six certificates which formed the subject matter of this prosecution.

The remaining question was whether, after allegedly being returned from the bank, these fully negotiable securities had left the premises of the firm by illegal means, so as to bring the factual situation within the "stolen, converted, taken by fraud" allegation of the indictment. The closest that question came to being answered was in the testimony of Mr. McMahon, who, during the time in question, was the partner in charge of back office operations:

(By the Prosecutor):

"Q. Did Hayden, Stone & Company ever give the stock away to anybody, Exhibit 5? A. To my knowledge it was mysteriously lost off our premises.

"Q. Did they ever sell it to anybody? A. Not according to my knowledge."

(By Defense Counsel):

"Q. In response to the last two questions you said it was mysteriously lost from the premises. A. That is how I would describe it, I think that is how I described it in the letter I wrote, that they had mysteriously disappeared.

• • •

"Q. You said the stock mysteriously disappeared. It might have been stolen. What else could have happened to this stock to explain for its disappearance? A. Well, several things could have happened, if we want to conjecture. It could have fallen into a waste paper basket after it was withdrawn from the bank loan and thrown out with the trash at night. That is the only other explanation I think I could give of it.

"Q. Actually, isn't your testimony as to how this stock was missing from your firm reduced to mere conjecture?

"(The Prosecutor): Objection.
"The Court: Sustained.

"Q. Do you know how this stock was removed from your firm? A. 'No' [R. 106-108].

The above was the sum total of the proof as to how the certificates left the premises of the Brokerage Firm. Indeed, there was no direct proof that the certificates were ever returned to the firm by the bank to which they were sent. No one who ever handled or saw them testified. No one from the bank which allegedly sent them to the firm testified.

D. The Government Attempts to Establish That the Defendant Actually Transported the Certificates Across State Lines.

Commencing with the FBI discovery of the stock in the possession of the Insurance Company on February 24, 1967 (R. 338-76), the next earlier point back to which the prosecution was able to trace the 26 stock certificates was the alleged delivery of them by the defendant to an officer of the Insurance Company at the motel on January 25, 1966. Assuming that they were last in the possession of the Brokerage Firm in July, 1966, there existed at least a six month hiatus which remained unaccounted for. There was no evidence introduced that

in any way tended to show where the certificates were during that period; nor how, when or from whom the defendant allegedly came into possession of the certificates.

Within the framework of the indictment and the Government's bill of particulars, it was the burden of the prosecution to establish that the defendant departed from the City of New York with the certificates and transported them to Gettysburg, Pennsylvania—all on January 26, 1966. In any event, absent a showing that the defendant crossed some state line with the certificates, no Federal crime could be established.

The Government relied upon the fact that at 8:40 A. M., on the date of the delivery, the defendant was detected, by a state trooper, speeding at a point some 100 miles within the Pennsylvania border. The prosecutor's argument to the jury was as follows:

> "In what direction [was he driving]? West. Now, as I look at the map west is away from New York towards Gettysburg. The Pennsylvania Turnpike at the point that is closest to New York abuts with the southern end of the New Jersey Turnpike. If you want to go from New York to Harrisburg by the shortest route you take a bridge or tunnel, I guess you'd have to take a tunnel from Manhattan go down the New Jersey Turnpike and go a hundred miles to where Trooper Lucky stops you and gives you a ticket and then continue on to Gettysburg where you deliver the stock" [R. 727].

This argument is reduced to the proposition that if a person is travelling west at a point some 100 miles into the Pennsylvania Turnpike, the person must have started his journey from New York City.

The Prosecutor used one additional element to bolster the claim of interstate transportation by the defendant.

It appears that the person who delivered the stocks had with him a female by the name of Joyce Cottone who *at one time* resided in Manhattan. Her identity was established by Marken and *his* female companion, both of whom failed to identify the defendant. No independent evidence was adduced to show that the defendant knew Joyce Cottone.

Assuming that the defendant was the person with Joyce Cottone, the prosecutor invited the jury to speculate that: 1) he must have picked her up in Manhattan, and 2) he must have had the certificates with him when he picked her up. His argument was "Well, isn't it reasonable to infer that Mr. Izzi picked her up in Manhattan and took her along for the ride from New York to Pennsylvania?" (R 461).

In contrast, the evidence did not show that Cottone was regularly in Manhattan at or about the time of the events of this case. The Government's only proof concerning this was the testimony of the superintendent of a Manhattan apartment building where Cottone once lived. The superintendent's testimony was so vague as to have been worthless. It placed Cottone as living in the apartment building for a six-month period, *ending* between three (3) and fifteen (15) months prior to the alleged transportation (R. 436-437).*

Even assuming that Cottone was still living in Manhattan at the time of the alleged transportation, and that

*It appears, from telephone records, that on the alleged date of the transportation, a telephone call was made from the messenger's motel room to the superintendent's telephone in New York. The prosecution argued (contrary to the testimony of its own witness—the superintendent) that this was evidence that Cottone still lived in the New York building. The superintendent did not testify concerning the alleged telephone call. In any event, the fact that Cottone may have telephoned someone whom she knew in New York reveals nothing about where Cottone was living at the time.

she was later seen in Pennsylvania with the person who delivered the certificates, there was no testimony concerning where the two met—it could just as well have been in Pennsylvania. Likewise, there was no testimony about where the certificates were acquired by the messenger—that, too, could just as well have been in Pennsylvania.

Indeed, the claim that the defendant transported the certificates across state lines tended to be negated by the testimony of another Government witness, Richard Gladwell. Gladwell testified that he had met the defendant twice. The *first* time was on an unspecified date in New York. The *second* time was in Philadelphia, Pennsylvania, in late December, 1966, or early January, 1967 (R. 355-356). Gladwell was the only Government witness who met the defendant prior to the date that the certificates were delivered to the Gettysburg Motel. No evidence was introduced to show that the defendant left Pennsylvania at any time from the date of their meeting until the defendant's alleged arrival in Gettysburg. Similarly, no evidence was introduced to establish the last date that the defendant was known to be in the State of New York or, for that matter, out of the State of Pennsylvania. No evidence was introduced to establish when, where or from whom the defendant allegedly obtained the certificates for delivery.

E. The Government's Failure to Prove That the Defendant Knew the Securities Were Stolen.

No direct evidence concerning this element was introduced by the Government. They relied completely upon an inference arising from the possession of recently stolen property and the alleged use of an assumed name by the defendant.

REASONS FOR GRANTING THE WRIT.

POINT I.

The defendant's rights under the self incrimination and due process provisions of the Fifth Amendment were violated by the Government's persistent efforts to demonstrate to the jury that the defendant had distorted his handwriting when he gave the court-ordered exemplars. The resulting prejudice was concretized by the court's charge which effectively instructed that this was an issue for the jury.

(A)

While it does not appear that this Court has previously had before it a case involving this particular issue, the problem is likely to arise with some frequency in the future due to the increased use of tests upon suspects and defendants, and due to certain recent decisions of this Court. It is noteworthy that the Court of Appeals, although rejecting our arguments, agreed that this issue raises "* * * problems, difficult both conceptually and practically * * *." For these reasons, we respectfully urge that the question presented deserves resolution by this Court because of the serious constitutional question involved and in the interests of the proper administration of justice.

(B)

The starting point for a discussion of this problem must be this Court's decision in *Gilbert v. California*, 388 U. S. 263 (1967), where it was said that:

> "One's voice and handwriting are, of course, means of communication. It by no means follows,

> however, that every compulsion of an accused to use his voice or write compels a communication within the cover of the privilege [against self incrimination]. A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection. *United States v. Wade,* 388 U. S. at 222-223. No claim is made that the content of the exemplars was testimonial or communicative matter. Cf. *Boyd v. United States,* 116 U. S. 616." 388 U. S. at 266-267.

Our contention is that the prosecution in the present case effectively used "the content of the exemplars [as] testimonial or communicative matter" in violation of the privilege against self-incrimination. Other decisions of this Court make clear that this was so.

In *Schmerber v. California,* 384 U. S. 757 (1966), a closely divided Court upheld the extraction of blood from a suspect for use in establishing a case against him. The majority opinion, however, made clear that all that was being upheld was the extraction of blood, and that reference to incriminating reactions of the defendant to the attempt to secure evidence from him would not be constitutionally permitted.

> "Although we agree that this distinction [between communicative and physical evidence], is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, *whether willed or not,* is to evoke the spirit and history of the Fifth

Amendment. Such situations call to mind the principle that the protection 'is as broad as the mischief against which it seeks to guard,' *Counselman v. Hitchcock*, 142 U. S. 547, 562.

"In the present case, however, * * * Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, were irrelevant to the results of the test, which depend upon chemical analysis and on that alone." 384 U. S. 764-765. (Italics added.)

The above extract from *Schmerber,* had the following revealing footnote:

"This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. *If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any testimonial products of administering the test—products which fall within the privilege.* Indeed, there may be circumstances in which the pain, danger or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the search, and nothing we say today should be taken as establishing the permissibility of compulsion in that case. * * *" 384 U. S. 765, footnote 9. (Italics added.)

"Petitioner has raised a similar issue in this case, in connection with a police request that he submit to a 'Breathalyzer' test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introduction of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under *Griffin v. California,* 380 U. S. 609. We think the general Fifth Amendment principles, rather than the par-

> ticular Fifth Amendment holding of Griffin, would be applicable in these circumstances, see *Miranda v. Arizona*, 384 U. S. at 468, note 37. Since trial here was conducted after our decision in *Malloy v. Hogan* [378 U. S. 1], making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements." 384 U. S. 765, footnote 9.

Likewise, in *United States v. Wade*, 388 U. S. 218 (1967), decided on the same day as *Gilbert, supra*, we find:

> "Moreover, it deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the lineup which implicates his privilege. The Government offered no such evidence as part of its case, and what came out about the lineup proceedings on Wade's cross-examination of the bank employees involved no violation of Wade's privilege" 388 U. S. 218, 223.

(B)

The factual basis for this point is set forth, *supra*, at pages 7-14. The following is clear:

1. The defendant was compelled by Court order to give samples of his handwriting to the Government for the ostensible purpose of aiding the Government in its attempt to identify the author of a questioned signature.

2. At no time prior to the Government's direct examination of its own expert did the Government lodge a protest concerning the degree of compliance by the defendant in giving the exemplars. Indeed, at the termination of the pre-trial session at which the exemplars were given, counsel for the defendant specifically sought to make sure that the representatives of the Government

were satisfied that the defendant had complied with all of their requests (Minutes of April 3, 1969, p. 57).

3. At no time did the Government request additional exemplars.

4. The Government possessed and introduced into evidence independently obtained specimens of the defendant's handwriting (signatures on fingerprint cards and income tax forms), and could have foregone use of the requested exemplars. Nevertheless, the Government chose to introduce the exemplars into evidence and use them as a basis for its expert's testimony, in addition to the independently obtained specimens.

5. The Government first raised the question of distorted handwriting during the examination of its own expert, and the Court immediately called the jury's attention to the fact that the handwriting which allegedly deviated from normal was that which was given "last week."

6. In his cross examination of the defense expert, the prosecutor challenged, at length, whether the requested exemplars were written in a "normal," "natural," "fluent" manner, and sought to establish that they were written "in an unusual manner."

7. The prosecutor followed through with this challenge in his summation.

8. The Court, in its charge, specifically instructed the jury that this issue was within their fact finding province.

> "[Y]ou may take into consideration the circumstances surrounding the handwriting specimens used as a basis for their comparison, including the fact that certain specimens were furnished last week when this trial against the defendant was imminent."

* * *

In light of the above, there can be no doubt that the jury's attention was specifically and repeatedly addressed to the question of whether the defendant had distorted his handwriting when he gave the exemplars. The necessary corollary of that proposition was that the defendant had betrayed a consciousness of guilt by an attempt to evade detection as the author of the questioned writing. The metamorphosis from identification to self-incrimination was complete, and it was directly the result of choice by the prosecution. It was the prosecution which compelled the exemplars, chose to use them, and chose to comment upon their authenticity. The Court concretized the resulting prejudice when it charged the jury that this was an issue for them to determine.

The decisions of this Court, previously cited, leave no doubt that the compelled product of tests upon a defendant may be used only for the purpose of identification, i. e., for the purpose of showing that a similarity or identity exists, and not for the purpose of placing in issue the degree of compliance by the defendant in submitting to the tests. Once the degree of compliance is placed in issue, as it was here, the test is no longer simply a means of identification, but, rather, it becomes an attempt to search the defendant's mind for consciousness of guilt. The Government's expert thus becomes a living lie detector. Cf. *Schmerber, supra.*

(C)

The opinion of the Court of Appeals responds to our argument with a two phased answer.

The first phase seeks to absolve the prosecution from an intentional capitalization upon the incriminatory aspects of the allegedly defective execution of the exemplars, and appears to hold that an arguable issue would

be presented only if an express accusation of falsification had been made by the prosecutor.*

This conclusion is difficult to understand. If the prosecutor's questioning, indeed, badgering, of the defense expert concerning alleged distortions in the exemplars, as well as the prosecutor's summation, did not constitute an accusation, then what were they? In requiring an unequivocal accusation, and in finding that such an accusation was not present, the Court of Appeals overlooks what was actually happening in the courtroom. The prosecutor got his message across to the jury as surely as he got it across to the Judge whose charge on the question left no doubt on the point. For what other reason would the Judge charge the jury that they could take into consideration the fact that the exemplars "were furnished last week when this trial against the defendant was imminent"?

The prosecution's course of action, in attempting to discredit the examplars, through the experts, implicitly discredited the defendant. We respectfully refer the Court to the text of the prosecutor's summation on this subject, quoted at page 13, *supra*. Any fair reading of that summation compels the conclusion that it was an explicit attack upon the defendant.

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*"Neither the testimony of the government witnesses nor the argument of the prosecutor contained an accusation that Izzi had sought to disguise his handwriting in executing the exemplars." (Appendix A, *infra*, page A5).

"We are therefore not required to confront the problems, difficult both conceptually and practically, which would be presented had Izzi made out his claim that the government had *intentionally* sought to capitalize on an implied admission arising from an alleged attempt to disguise his handwriting in executing exemplars under coercion of a court order." (Appendix A, *infra*, page A5, footnote 1) [Emphasis in original].

The fact is that the burden of self-incrimination was thrust upon the defendant by the course of the prosecution, whether intentional or not. For that reason, the decisions of this Court, cited above, require the reversal of his conviction.

Having attempted to eliminate intentional accusation as an aspect of this case, the Court of Appeals then shifted to the second phase of its analysis:

> "Under *Gilbert*, the government may compel the execution of handwriting exemplars and introduce them into evidence in order to determine the authorship of another writing. If *Gilbert* is not to be rendered meaningless, the government must be allowed to explain differences between the exemplars and the signature sought to be identified, particularly where the defendant points to these differences as evidence of non-common authorship." (Appendix A, p. A6, *infra*.)

> "• • • The basis for the decision in *Gilbert* that exemplars are not protected by the fifth amendment privilege was that they are not 'testimonial.' The lines drawn on the paper, although they may constitute words, are devoid of testimonial content. The process of executing the exemplar does, however, contain an element of testimony. In furnishing the requested sample, the writer inevitably makes the implied statement that 'this is my normal handwriting.' *Gilbert* represents an apparent determination that this element of testimony is insufficient to bring handwriting exemplars within the ambit of the privilege against self-incrimination. If an accused were free to disguise his handwriting, by writing the requested words in block letters, without fear of any sanction, exemplars would be worthless and the authorization to compel their execution granted by *Gilbert*, *illusory*." (Appendix A, footnote 1, p. A5, *infra*.)

The above reasoning is predicated upon two unwarranted inferences from this Court's opinion in *Gilbert*. The problem presented by "this is my normal hand-

writing," was not present in Gilbert, nor in any of this Court's related decisions; it has not been removed from the protection of the privilege against self-incrimination. To the contrary, this Court has carefully guarded against such a conclusion. See the excerpts from *Gilbert v. California, Schmerber v. California* and *United States v. Wade,* quoted above at pages 22-25. If any conclusion is to be drawn from those cases, it must be that the issue of the defendant's compliance may not be spread before the jury.

The second unwarranted inference by the Court of Appeals is that the only and proper remedy for alleged non-compliance is the "sanction" of exposure before the jury. In reaching this conclusion, the Court overlooked its own decision in *United States v. Doe,* 405 F. 2d 436 (2d Cir., 1968). There, it was specifically held that the contempt power of the Court may be used to compel an uncooperative witness to execute handwriting exemplars. The reasoning of the Court of Appeals would, perhaps, be more persuasive, if, in the present case, some attempt had been made by the government to remedy what it considered to be distorted exemplars. However, the government made no complaint and made no attempt to secure what it would consider to be more representative exemplars. It was content to use what it had.

POINT II.

The defendant's rights under the self-incrimination and due process provisions of the Fifth Amendment were violated when he was compelled by order of the trial court, to furnish the Government with handwriting exemplars in the form of the incriminating document.

If the Court of Appeals is correct in holding that the worth of compelled handwriting exemplars is dependent

upon a prosecutorial right, in the presence of the jury, to claim disguise in their execution (Appendix A, pp. 5-6, *infra*), then we respectfully request that this Court reconsider its holdings which group handwriting together with those types of identification evidence which do not require active participation by the accused, such as fingerprints, hair, blood, physical appearance, etc. See: *Gilbert v. California*, 388 U. S. 263 (1967); *United States v. Wade*, 388 U. S. 218 (1967), and *Schmerber v. California*, 384 U. S. 757 (1966). The underpinning of such a grouping is that there is *no* testimonial feature in the product of the test. In drawing its inference from *Gilbert*, the Court of Appeals belies that assumption.

POINT III.

The Government's eve-of-trial surprise motion for the defendant to submit to handwriting analysis was admittedly the result of Government neglect. The failure of the trial court to grant a continuance so that a proper handwriting defense could be prepared, deprived the defendant of due process of law and was a violation of the spirit of the Federal Rules of Criminal Procedure.

We respectfully submit that the failure of the trial court to grant a continuance to the defense so that the defense would have an adequate opportunity to meet the evidence of the prosecution under the circumstances of this case, constituted a denial of due process and subjected the defendant to a trial by ambush.

As was stated in *Ungar v. Sarafite*, 376 U. S. 575, 589:

> "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every

> denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. *Avery v. Alabama*, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Chandler v. Fretag*, 348 U. S. 3, 75 S. Ct. 1, 99 L. Ed. 4. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."

The recent decision in *United States v. Kelly*, 420 F. 2d 26 (1969), by the Court of Appeals for the Second Circuit, would appear to clearly be in point as to the difficulties experienced by defense counsel in his efforts to meet the newly revealed evidence of the prosecution. *Kelly* involved the surprise use by the prosecution of a new method for drug analysis, and the Court held that the failure of the prosecution to give the defense adequate advance notice that such a test would be relied upon, required the reversal of the conviction:

> "The determination not to abort the trial, which had already consumed much time and expense, is understandable in the light of the strength of the government's case, but we think in the circumstances here the other choice was the proper one. The course of the government smacks too much of a trial by ambush, in violation of the spirit of the rules. A new trial is required, with a fair opportunity for the defense to run its own neutron activation tests of the material to determine the atomic similarity or dissimilarity of the trace elements in the samples." 420 F. 2d 26, 29.

It is clear that due solely to the prosecution's oversight, the surprise motion to compel handwriting exem-

plars was made on the eve of trial. Close analogy is found in *United States v. Neff*, 212 F. 2d 297 (3rd Cir., 1954) at pages 309-310, where it was held that the amendment of a bill of particulars by the government just three days before trial and the failure of the trial court to grant a continuance, required a reversal of the defendant's conviction.

We respectfully submit that the defendant was not given a fair opportunity to defend himself. Upon the granting of the prosecution motion, he applied to the Court for a continuance, and that was denied. One weekday intervened before the start of trial. He was not able to retain a handwriting expert until the late afternoon of the third day of trial—one day before the expert had to testify. During the period that he was attempting to retain the expert, the basic materials, concerning which the expert would have to testify, were in Washington.

When an expert was finally found, he was obliged to rush to the courthouse in the evening to examine and photograph the basic documents in a corridor of the courthouse. Is it a wonder that the defense was misled in believing that the documents displayed to the defense expert by the prosecution would be introduced into evidence by the prosecution and would be used by the prosecution expert? It was not until the next day, when both experts testified, that the contrary was learned, and the defense exhibits, prepared overnight, were rendered a shambles!

The defendant was submitted to steam roller justice by this denial of an opportunity to adequately prepare and present his handwriting defense. The shattering effects of that deprivation are spread upon the record.

spilling over into the effectiveness of the defense reaction to other newly revealed evidence in the case.*

For the above reasons, due process of law and the fair administration of justice require the formulation of a rule which would prevent a prosecutor, regardless of intent, from effectively ambushing a defendant by such procedures.

POINT IV.

The Government failed to prove each of the essential elements of the crime charged; the sum total of successive inferences required for conviction was so dependent upon conjecture that a reasonable doubt was present as a matter of law; thus, the conviction violated due process of law.

The Government had the burden of proving each of the essential elements of the crime charged beyond a reasonable doubt. Our earlier points are directed to the manner in which the Government sought to establish that the defendant was the person who delivered the stock certificates to the motel in Gettsyburg. Assuming that he was that person, it remained for the Government to prove: a) that the certificates had, in fact, been stolen; b) that the defendant transported them across State lines; and, c) the defendant knew they were stolen.

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*Prior to the commencement of trial, the only information given to the defense by the prosecution was that on Jan. 25, 1967, the defendant, in an unspecified automobile, transported twenty-six certificates of stolen IBM stock from an undisclosed point in New York to an undisclosed point in Gettysburg. Once this charge was fleshed out at trial, the defendant sought a continuance for the purpose of interviewing witnesses and investigating the scene of the key events at Gettysburg. The motions were denied.

This Court has made clear that:

> "The verdict in a criminal case is sustained only when there is 'relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt' that the accused is guilty." *American Tobacco Co. v. United States*, 328 U. S. 781, 787 (1946).

The Government attempted to establish theft by the conclusory, hearsay statements of a representative of the Stock Brokerage Firm that the absence of the certificates was unaccounted for. Even that representative was willing to speculate that the certificates might have been thrown out with the trash by mistake. In light of the currently notorious record-keeping problems of Wall Street stock brokerage firms, his speculation was as good as any other (*supra*, pp. 17-21).

The claim of interstate transportation, *by the defendant*, was based upon the fact that the defendant, earlier in the day, at a point one hundred miles from New York, was observed driving west (away from New York!), and had with him another person who was shown to have once lived in New York. On the other hand, the defendant was shown to have been in the State of Pennsylvania at least a month earlier, and was not shown to have been out of Pennsylvania since that time (*supra*, pp. 21-25).

The Government sought to establish the defendant's knowledge that the certificates were stolen by relying upon the inference which may arise from the possession of recently stolen property. This inference was at least neutralized by: the time period involved—six months; the legitimate appearance of both the certificates and their intended use; and the fact that the person who delivered the certificates was a mere messenger. The use

of an assumed name was no more than a suspicious circumstance. The Government's proof established that the person who delivered the certificates registered into the same room with Joyce Cottone, a married woman. It cannot seriously be contested that motel registration records, throughout the country, contain a substantial number of assumed names derived from such circumstances. Likewise, the person was transporting negotiable securities of high value, and, for innocent reasons of security, had good reason to travel anonymously.

We respectfully submit that the case, taken as a whole, was so thoroughly based upon conjecture, that the trial court should have granted the defendant's motion for a directed verdict of acquittal.

CONCLUSION.

For all of the above reasons, the writ of certiorari should be granted.

Respectfully submitted,

THOMAS J. TODARELLI,
Attorney for Petitioner.

HENRY J. BOITEL,
Of Counsel.

May 15, 1970.

APPENDIX A.

Opinion of United States Court of Appeals.

(2391)

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 521—September Term, 1969.
(Argued March 11, 1970 Decided April 20, 1970.)
Docket No. 34133

UNITED STATES OF AMERICA,

Appellee,

v.

RUDOLPH IZZI,

Appellant.

Before:

SMITH, KAUFMAN and HAYS,

Circuit Judges.

Appeal from a judgment of conviction entered upon a jury verdict in the United States District Court for the Southern District of New York, Walter R. Mansfield, *Judge,* for the interstate transportation of stolen securities in violation of 18 U.S.C. §2314.

Affirmed.

JACK KAPLAN, Assistant United States Attorney, New York, N. Y. (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, on the brief), *for appellee.*

(2392) THOMAS J. TODARELLI, New York, N. Y. (Sabbatino & Todarelli, and Henry J. Boitel, on the brief), *for appellant.*

KAUFMAN, *Circuit Judge:*

Appealing from his conviction for the interestate transportation of stolen securities, Rudolph Izzi alleges that the introduction of handwriting exemplars executed at the demand of the government, in conjunction with testimony that he had intentionally varied his handwriting, violated his privilege against self-incrimination. He also claims that the trial court's denial of his numerous requests for delays precluded a fair trial and that the government failed to prove the elements of the crime.

On this appeal from a judgment of conviction based upon a jury verdict, we must take that view of the evidence most favorable to the government. *United States v. Kahaner*, 317 F. 2d 459 (2d Cir. 1963). Most of the testimony centered on the events of January 25, 1967. Izzi's first encounter on that date involved, somewhat prophetically, a brush with the law. When Izzi was 100 miles within Pennslyvania, he was stopped for speeding at 8:40 a.m. while driving west on the Pennsylvania Turnpike. The appellant driving a new Cadillac registered in New York, and was accompanied by one Joyce Cottone, a resident of New York. In an effort to get on his way, Izzi volunteered to the trooper that he was hurrying to an important appointment in Gettysburg, Pennsylvania; never-

theless, he was taken before a local justice of the peace, who summarily fined him $15. This small episode completed, Izzi proceeded on to Gettysburg, arriving before noon at the Gettysburg Motor Lodge where he registered under the psuedonym "R. Randolph."

(2393) Also staying at the Motor Lodge on this day was one John Marken, an officer of Bankers and Telephone Employees Insurance Co. (BTEICo). Marken had been told to expect the arrival of a "Mr. Randolph" who would deliver to him 2600 shares of International Business Machines stock required for a BTEICo. recapitalization program. Shortly after Izzi's arrival at the motel, the two met and Izzi transferred to Marken 26 100-share certificates of IBM common stock. These certificates, worth more than $1,000,000, were registered in the name of Hayden, Stone & Co., a firm of New York stockbrokers, and constituted part of a group of 50 certificates which had mysteriously disappeared from the firm's New York headquarters in July or August 1966. After the Gettysburg transaction, the 26 certificates were taken by Marken's attorney to the Pennsylvania Insurance Commissioner for inspection and placed in a safe deposit box at the Harrisburg National Bank and Trust Co. The Commissioner had been insisting on a substantial infusion of new capital into BTEICo.

The use of the certificates by BTEICo. was uncovered in February 1967, and the shares were seized by the FBI on February 24, 1967 pursuant to a search warrant. Approximately a week later Izzi disappeared and, although a warrant for his arrest was issued March 8, 1967, he remained at large until May 3, 1968, when he voluntarily surrendered to the authorities. Izzi's indictment for interstate transportation of stolen property of a value greater than $5000, in violation of 18 U.S.C. §2314, had been filed more than a year prior to his surrender. He was convicted

on April 11, 1969 following a one-week trial before Judge Mansfield and a jury, and sentenced to eight years' imprisonment.

(2394) Izzi claims that the handwriting exemplars he was required to execute shortly before commencement of his trial were the subject of impermissible comment by the government and its witnesses. With only the "R. Randolph" motel registration card and several specimens of Izzi's own signature on which to base his judgment, the government handwriting expert was apparently unable to make a conclusive determination that Izzi had written the signature on the card. Accordingly, one week before the trial, the government secured a court order compelling Izzi to provide handwriting exemplars or "standards." It is apparent to the eye that the "R. Randolph" signatures executed by Izzi in compliance with this order in the presence of his counsel are noticeably less fluent than his normal signature. Izzi does not ask us to hold that the mere introduction of these exemplars at trial violated his fifth amendment privilege against self-incrimination. *Gilbert v. California*, 388 U. S. 263 (1967), forecloses this line of attack. Instead, he contends that the government improperly emphasized the differences between Izzi's normal signature and the exemplars, intentionally suggesting that he had attempted to disguise his normal handwriting and by so doing had indicated consciousness of guilt. It is this implied admission which Izzi alleges was wrung from him in violation of the fifth amendment. Although Izzi's claim that the government sought to make use of an alleged acknowledgment of guilt arising from the compelled execution of handwriting exemplars con-

stitutes an ingenious attempt to avoid the thrust of *Gilbert*, we find it to be unsupported by the record.[1]

(2395) Neither the testimony of the government witnesses nor the argument of the prosecutor contained an accusation that Izzi had sought to disguise his handwriting in executing the exemplars. Webb, the government's handwriting expert, attempted to account for the absence of a characteristic feature of Izzi's handwriting in the exemplars by pointing out that the exemplars had been written "much slower." In cross-examination of Osborn, the defendant's expert, the prosecutor sought to impeach Osborn's testimony relating to differences between the exemplars and the "R. Randolph" signature on the motel registration card (the inference suggested by the defense being that they did not have a common author), by drawing his attention to the differences between the exemplars and Izzi's "normal," "fluent" signatures.

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[1]We are therefore not required to confront the problems, difficult both conceptually and practically, which would be presented had Izzi made out his claim that the government had *intentionally* sought to capitalize on an implied admission arising from an alleged attempt to disguise his handwriting in executing exemplars under coercion of a court order. The basis for the decision in *Gilbert* that exemplars are not protected by the fifth amendment privilege was that they are not "testimonial." The lines drawn on the paper, although they may constitute words, are devoid of testimonial content. The process of executing the exemplar does, however, contain an element of testimony. In furnishing the requested sample, the writer inevitably makes the implied statement that "this is my normal handwriting." *Gilbert* represents an apparent determination that this element of testimony is insufficient to bring handwriting exemplars within the ambit of the privilege against self-incrimination. If an accused were free to disguise his handwriting, by writing the requested words in block capitals or with his opposite hand, without fear of any sanction, exemplars would be worthless and the authorization to compel their execution granted by *Gilbert*, illusory.

Under *Gilbert*, the government may compel the execution of handwriting exemplars and introduce them into evidence in order to determine the authorship of another writing. If *Gilbert* is not to be rendered meaningless, the government must be allowed to explain differences between the exemplars and the signature sought to be identified, (2396) particularly where the defense points to these differences as evidence of non-common authorship.

II.

Izzi also contends that the district court's denial of his series of requests for delay commencing shortly before the trial and continuing until its conclusion prevented him from countering the government's handwriting evidence effectively and from establishing an "alibi" defense. The result, he argues, was to deny him due process of law. Izzi complains that the prosecutor failed to notice the taking of the exemplars until six days before trial, did not provide his expert with convenient facilities for examination of the exemplars and the accompanying report, and further impeded the expert's preparation by never disclosing which signatures would be introduced at trial. While we would have preferred greater generosity on the part of the prosecutor, any inconveniences occasioned were not insurmountable; nor did they prejudice Izzi. He had ample opportunity to engage a handwriting expert, and the expert prepared an enlightening exhibit which illustrated his testimony. That the government's failure to introduce into evidence certain of the signatures portrayed in the defense exhibit necessitated last-minute alterations is hardly a basis for the claim that Izzi was denied a fair trial.

The "alibi" defense and, consequently, the request for a continuance in order to establish it merit only brief mention. Izzi sought to prove his "alibi" by a series of cal-

culations linked to a chain of inferences which he insists would have shown that he could not have arrived at the Gettysburg Motor Lodge before 10:30 a.m. But, even if established, this theory would have availed him naught, for the government's case did not rest on proof that Izzi had arrived (2397) at any specific hour on the morning of January 25. The claimed "alibi" defense was, in short, no defense at all, and the request for a continuance to prove it, whimsical.

III.

Izzi's final argument is that the government failed to prove the elements of the crime charged in the indictment. Specifically, he charges that the certificates were not shown to have been stolen, that there was no proof he transported them across state lines, and that, even if stolen, he was not shown to have had knowledge of this. The evidence established, however, that on July 13, 1966 the certificates transported by Izzi were logged into the locked and guarded "cage" where securities were kept at the New York offices of Hayden, Stone & Co. There is no record of their being removed, such as would have existed, under Hayden, Stone procedures, if the removal had been authorized. An extensive search of the "cage," involving 40 employees, virtually negated any possibility that they had been misplaced within its confines. This unexplained disappearance of carefully-handled, closely-guarded documents suffices to support an inference of theft. *United States v. Owens*, Docket No. 34050 (2d Cir. Jan. 7, 1970).

Moreover, there was sufficient evidence from which it could be inferred that Izzi's journey had begun in New York. His car was registered there, and his lady companion was a resident of Manhattan who lived there with

one of her children. Her telephone call from the motel to the New York City apartment where the child was staying suggests that her departure had been recent. Finally, when apprehended by the Pennsylvania state trooper, Izzi was driving west, away from New York. Once it is established that Izzi's point of departure had been within New York, (2398) the inference that he transported the securities, which were stolen in New York, from that state to Pennsylvania follows logically.

Similarly, the evidence offered a basis for the conclusion that Izzi knew the certificate to have been stolen. The possession of recently stolen merchandise lends support to an inference of knowledge. See *United States v. DeSisto*, 329 F.2d 929, 935 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964); *Boehm v. United States*, 271 Fed. 454 (2d Cir. 1921) (gaps of four and nine months between theft and possession). Izzi's use of an assumed name in Gettysburg also serves to establish his awareness that he was not a mere messenger transporting legally-acquired securities for use in an ordinary business transaction. We see no reason to disturb the verdict.

Affirmed.

APPENDIX B.

Judgment and Commitment Appealed From.

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

v.

RUDOLPH IZZI.

No. 67 Cr. 147

On this 14th day of May, 1969, came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly transporting in interstate commerce, securities of the value of $5,000.00 and more, knowing the same to have been stolen, converted and taken by fraud. (Title 18, United States Code, Section 2314) as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

APPENDIX B.

Judgment and Commitment Appealed From

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHT (8) YEARS.

Bail pending appeal is fixed in the sum of $150,000.00, and conditioned on the prompt execution of the appeal.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

WALTER R. MANSFIELD,
United States District Judge.

John Livingston,
Clerk.

U. S. District Court
Filed Nov 14 1969
S. D. of N. Y.

APPENDIX C.

Judgment of Affirmance of United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of April one thousand nine hundred and seventy.

Present:

Hon. J. Joseph Smith,
Hon. Irving R. Kaufman,
Hon. Paul R. Hays,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RUDOLPH IZZI,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk.

APPENDIX D.

Points Raised in the Court of Appeals.

Point I—The Defendant's rights under the due process and self-incrimination clauses of the Fifth Amendment were violated by the Government's attempts, buttressed by the Court, to establish that the Defendant has distorted his handwriting when he gave the Court-ordered exemplars.

Point II—The Defendant was deprived of his Fifth Amendment rights against self-incrimination by the order of the Trial Court directing him to give detailed handwriting exemplars in the form of the incriminating questioned document to agents of the Federal Government more than a year after arraignment and on the eve of trial.

Point III—The Defendant was denied a fair trial in violation of the Fifth Amendment and of the spirit of the Federal Rules of Criminal Procedure by a variety of prosecution techniques which deprived him of a fair opportunity to meet the issues at trial and which, in effect, subjected the Defendant to a trial by ambush.

Point IV—The Government failed to prove that the stock certificates were stolen; did not establish Federal Jurisdiction in that it failed to prove that the Defendant transported the certificates across State lines; and failed to prove that the Defendant knew the certificates were stolen.

APPENDIX E.

Constitutional Provisions and Statutes Involved.

18 U.S.C. 2314

§2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

U.S. CONSTITUTION—AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1585

RUDOLPH IZZI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1970. The petition for a writ of certiorari was filed on May 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether handwriting exemplars of a defendant were properly utilized in a criminal trial.

2. Whether the court erred in denying various motions for a continuance.

3. Whether the evidence was sufficient to sustain the conviction.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of the interstate transportation of stolen securities in violation of 18 U.S.C. 2314. On May 14, 1969, he was sentenced to eight years' imprisonment. The court of appeals affirmed (Pet. App. A).

1. Between July 13 and August 26, 1966, fifty 100-share certificates of the common stock of International Business Machines Corporation registered in the name of Hayden, Stone and Co., stockbrokers, disappeared from the firm's New York headquarters (Tr. 50–54, 68–69, 88–89; Govt. Ex. 4). On January 25, 1967, 26 of these stock certificates, still registered in the name of Hayden, Stone and Co., were delivered to an officer of an insurance company at a motel in Gettysburg, Pennsylvania, by a person who had registered at the motel as "R. Randolph" (Tr. 311–312). The stock was used by the insurance company as part of a recapitalization. It was first displayed to the State insurance commissioner and then placed in a safe deposit box in Harrisburg (Tr. 154–164, 346–348).

At the trial, the motel manager identified petitioner as the person who had registered at the Gettysburg motel as "R. Randolph" on January 25, 1967 (Tr. 176). Other witnesses identified a blond woman who accompanied "R. Randolph" as Joyce Cottone, a resident of Yorkville, New York. "R. Randolph" and his companion had arrived at the motel that morning in

a new Cadillac bearing New York license plates (Tr. 311–312). Earlier that same morning petitioner, accompanied by a blond woman, had been stopped for speeding on the Pennsylvania turnpike 40 miles from Gettysburg. Petitioner was driving a new Cadillac and had explained to the State trooper that he was in a hurry for an appointment at Gettysburg (Tr. 128–133).

On February 24, 1967, the 2,600 shares of IBM stock were seized by FBI agents pursuant to a search warrant (Tr. 372–373). One week later, on March 3, 1967, petitioner sold his three-month-old Cadillac (Tr. 487, 679–680) and disappeared. A warrant for petitioner's arrest was issued on March 8, 1967. Petitioner remained at large until May 3, 1968, when he surrendered himself to the authorities (Tr. 449–461, 487–507).

2. Prior to trial, the court granted the government's motion to require petitioner to execute handwriting exemplars. Thereafter, with defense counsel present, petitioner wrote his name on three cards, wrote "R. Randolph," the name on the motel register, on four cards and wrote the letters of the alphabet, numbers, months of the year and One Hundred Dollars and no Cents on four other cards (April 3 Tr. 56–57). At the trial a government handwriting expert, after examination of these cards and the signatures of petitioner as written on a tax return and on fingerprint cards, concluded that petitioner was the person who signed the name "R. Randolph" on the motel register (Tr. 467, 472–478).

ARGUMENT

1. Petitioner recognizes that this Court recently held in *Gilbert* v. *California*, 388 U.S. 263, 266, that the taking of handwriting exemplars does not violate the privilege against his self-incrimination.[1] His principal claim is that the government in its questioning of its own handwriting expert and a defense expert and in its summation did not simply use the exemplars for comparison with the questioned signature on the motel register but also employed the exemplars as an implied admission of guilt—by accusing petitioner of disguising his handwriting in the exemplars.

The record does not support this allegation. The government's expert merely explained that slower writing was responsible for the absence of a characteristic lift of the pen or pencil between certain letters on the requested exemplars (Tr. 475–476). In its cross-examination of the defense expert, and in its summation, the government sought to discredit testimony that differences between the exemplars and the questioned writing precluded a conclusion of common authorship by noting that differences between the exemplars written in the ordinary course of business and the exemplars written by request were explainable (Tr. 613–617, 722–724). As the court of appeals pointed out, "[i]f *Gilbert* is not to be rendered meaningless, the government must be allowed to explain differences between the exemplars and the signature sought to be identified, particularly where the

[1] Such exemplars were properly the subject of a pretrial order. *United States* v. *Doe*, 405 F. 2d 436 (C.A. 2). Cf. *United States* v. *Wade*, 388 U.S. 218.

defense points to these differences as evidence of non-common authorship" (Pet. App. A6).

2. Petitioner's contention that his various motions for a continuance were wrongfully denied is fully answered in Part II of the court of appeals' opinion (Pet. App. A6–A7). Significantly, petitioner does not claim that the handwriting expert witness for the defense considered himself in any way handicapped by a lack of adequate time to prepare his testimony.

3. The evidence was sufficient to establish petitioner's guilt. The unexplained disappearance of 5,000 shares of IBM stock from one of the largest brokerage firms in New York and the subsequent appearance of 2,000 of these shares to support the reorganization of an insurance company in Pennsylvania, in the circumstances here, warranted the conclusion that the stock had been knowingly transported from New York to Pennsylvania. As the court of appeals pointed out, the interstate transportation of the stock is additionally supported by the registration of petitioner's automobile, his direction of travel which indicates travel from New York to Gettysburg, and the New York residence of his companion. Petitioner's use of an assumed name in Gettysburg and his recent possession of stolen securities provided ample basis for the jury's inference that he had knowledge of the theft.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

JUNE 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970